

FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.295 OF 2006

Office Notes, Office
Memoranda of Coram Court's or Judge's orders
appearances, Court's orders
or directions and
Registrar's orders

Mr.Uday Prakash Warunjikar for the
petitioner.

Mr.Rajesh More APP for the State.

Coram : R.S.Mohite, J

Date : 4th April, 2006.

PC

1. Advocate for the petitioner states that he wants to make a fresh application before the appellate Court and for that purpose he would like to withdraw this petition. Petition is therefore, dismissed as withdrawn. Interim relief is vacated. If any application is made before the appellate Court, the same will be decided on its own merits.

(R.S.Mohite, J)

**CRIMINAL APPLICATION 28/2006
IN
CRIMINAL APPLICATION 8083/2005**

1. In this matter notices were issued to the respondents in the application for restoration. It appears that the main application no.8083/2005 was dismissed for default at the stage when notices were not issued and none appeared for the respondents. In the circumstances, though notices are not served, I am inclined to restore this application. It may be stated that this application is placed on record alongwith companion matter which was due today and which companion matter seeks the quashing and setting aside of the subsequent order made on the subsequent application for the same relief i.e. for allowing additional evidence. In the circumstances, Criminal application 28 of 2006 is allowed and Criminal application 8083/2005 is restored to file.

(R.S.Mohite, J)

CRIMINAL APPLICATION 8083/2005

1. This application impugns an order passed below Exhibit-18 in Criminal Appeal No.17 of 2001. The said appeal which is pending in the Court of Additional District Court, Baramati is directed against the conviction recorded by the JMFC, Indapur on 17.9.2001 for an offence punishable under Section 138 of the Negotiable Instruments Act. The trial Court had sentenced the appellant to under-go RI for one year and to pay compensation of Rs.20 lakhs to the respondents. In the trial Court complainant had led the evidence of himself and 2 witnesses. These 2 witnesses were PW-2 Praveen Pawar, a clerk from Cosmos Bank which was the bank of the accused and PW-3 Ajit S.Jadhav who was the clerk from Pune Zilla Madhyawarti Bank Pune, which was the bank of the complainant. These witnesses

were cross-examined by the accused. At the end of the trial, conviction and sentence was recorded as aforesaid. The appeal came to be filed by the appellant in the Court of the Additional District Judge, Baramati in the year 2001 and was numbered as Criminal appeal no.17 of 2001. 3 years after filing of the appeal on 29.10.2004 an application came to be made for recording additional evidence in the appeal. The evidence sought to be recorded was of the officer of the complainant's Pune Zilla Madhyawarti Bank Pune. The reason given in the application for re-call of the witness was that there was no clear evidence to show as to how the bank memos were sent by the complainant's Pune Zilla Madhyawarti Bank to the complainant. The reason as to why this evidence was necessary for the appellant was to show that the complaint may be barred by limitation. It is

no where stated in the application as to what prevented the accused from asking this question to the witness when the witness was in the box. It is also not mentioned in the application that the accused had received any fresh information that the bank memos had been received by the complainant prior to 8.10.1998. It may be noted here that the complainant had categorically mentioned in the evidence that he had received the bank memos on 8.10.1998 and there was no suggestion that he has received the same prior to 8.10.1998. The Additional District Judge, Baramati in his impugned order dated 23.8.2005 gave this very reason for rejecting the application for leading additional evidence. He however, went on to give further reason to the effect that the Cr.P.C did not provide any remedy to the accused for leading additional evidence in

appeal. This additional reason is attacked and in my view correctly because there is no such fetter laid down by Section 391 of Cr.P.C. However, on the earlier reasoning the end result of the application for recall of witness would have been the same. It was sought to be contended that the matter may be remanded. However, on the merits of the matter, it is clear that sufficient opportunity was given for cross-examination of the witness of the complainant's bank. Hence, I am not inclined to entertain this application and the same is rejected.

2. It must be born in mind that though the wording of Section 391 of Cr.P.C. is wide, the Apex Court has time and again held that the power under Section 391 must be sparingly used and must not be used in any way as to cause prejudice to the accused or as a disguise for

re-trial or to change the nature of the case against the accused. In the case of **Rajeswar Prasad V. State of W.B.** reported in **AIR 1965 SC 1887** the Apex Court has clearly held that an order under Section 428 of the 1898 Code which corresponds to section 391 of the present Code must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirement of justice dictate otherwise. The same reasoning would also apply where the defence have had fair opportunity. It was the defence contention that no such fair opportunity was given by the trial Court. Apart from this, this Court has settled the law by holding that even if the complaint was beyond the period of limitation and application for condonation of delay can be made at any stage and can be made even after cognizance is taken or even at the appellate or revision stage. In the

circumstances, no benefit is likely to accrue to the accused. In this view of the matter, application is rejected.

(R.S.Mohite,J)